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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees;*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees;* and

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No. 60

UNITED STATES, ET AL., *Appellants,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners The Southern Railway Company et al. petition the Court for a rehearing of its decision in the above-captioned cases. The grounds for this petition are as follows:

1. Although the point is not discussed in the Court's opinion and was neither briefed nor argued, the Court's decision radically extends the scope of section 3(1) of the

Interstate Commerce Act, 49 U.S.C. 3, by applying it so as to require equality between two groups—here, motor carriers and ordinary shippers—between whom there is no competitive relationship. Because of the importance of the issue, and because the precedent against the Court's decision was not brought to the Court's attention, we suggest the desirability of a rehearing. In more detail, our position is as follows:

First, as we read the opinion there can be no reasonable doubt that the Court concluded that section 3(1) of the Act, whether alone or in conjunction with sections 2 and 1(4), supported the Commission's "open tariff" Rules.

Second, an overwhelming weight of authority prior to this Court's decision limits section 3(1) to those situations in which there is a competitive relationship between the person advantaged and the person disadvantaged.[1]

Third, this long line of decisions was not brought to the attention of the Court. In the lower court, we noted that section 3 could not possibly have been relied upon by the Commission in support of the Rules because of this precedent (Br. p. 20). The Government, in turn, concede that the Commission did not rely upon section 3(1) "because competition between favored and disfavored shippers must generally be shown to make out a case of undue prejudice or advantage . . ." (Br. p. 16 n.6). In this Court, however, neither side advised the Court that if it relied upon section 3(1) in support of the Commission's Rules it would be departing drastically from precedent.

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[1] Literally dozens of decisions could be cited. For a compilation, see note 37 under the annotations to section 3(1) in Interstate Commerce Acts Annotated (1930) and its supplements. For representative recent decisions, see, *e.g.*, *Stanislaus County* v. *Atchison. T. & S.F. Ry. Co.*, 302 I.C.C. 365, 377 (1956); *Osborne McMillan Elevator Co.* v. *Mpls., St. P. & S. Ste. M. R.R. Co.*, 306 I.C.C. 155, 160 (1959); *Freight, All Kinds, From Ferguson, Ind., to St. Louis, Mo.*, 302 I.C.C. 11, 12 (1957); *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21, 26-27 (1957).

Fourth, while this default on the part of appellants might appropriately be held against them were this case to involve only the resolution of a private dispute, we suggest that it should be waived where an important question of construction of a fundamental statutory provision is at stake. We also suggest in this connection that it is not entirely irrelevant that the United States, as evidenced by its brief in the lower court, was well aware of the problem and that it, too, did not call it to the attention of the Court.[2]

Fifth, this is not a case in which the other bases for the Court's opinion are self-evidently ample. As to the discrimination questions, those bases, apart from section 3, are sections 2 and 1(4), 49 U.S.C. 2, 1(4). We will not repeat the detail of the argument that on its face section 2 is restricted to rate discrimination and does not extend to service discrimination—particularly since the Court did not explicitly hold otherwise. As to section 1(4), however, we think it not inappropriate to note that by its decision in this case the Court has *sub silentio* overruled *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, in which the Court ruled that violations of section 1(4) are remediable only by judicial action, not by Commission action. While

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[2] There was a parenthetical remark in the Government's brief in this Court conceding that in a section 3(1) case the "two shippers must be in competition with one another," coupled with a following paragraph declaring that this, among other, considerations has "never been deemed relevant in a case of personal discrimination" (Br. pp. 35-36); but that declaration was supported only by a decision relevant to, if anything, the question of competition between the allegedly discriminating carrier and the "victim" shipper, not to the question of competition between the "victim" shipper and the "preferred" shipper. The two questions are wholly different, and the Government did not suggest otherwise. Accordingly, particularly in view of the Government's concession in the lower court that section 3(1) could not have been relied upon by the Commission because of the absence of a competitive relationship between the motor carriers and ordinary shippers, we do not feel that this eliptical—and perhaps inadvertently misleading—reference to this question in the Government's brief detracts from our assertion that the Government did not, for whatever reason, advise this Court of the problem.

we did call the attention of the Court to *Pennsylvania* and the subsequent decisions based upon it (Br. 54), the Court did not in its opinion discuss the issue.

Sixth, the overruling by the Court of prior decisions applying section 3(1)—an overruling that appears to have been inadvertent—underscores the relevance of section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b). From the inception of this litigation, one of appellees' principal contentions has been that the Commission failed to comply with section 8(b) because it did not adequately explain the basis for its decision, and that at the very least the Commission was restricted to defending its decision on the basis of the only provision it even mentioned, section 2 of the Act. The Government studiously avoided this issue, both in the lower court and in this Court. Nor did this Court mention it in its decision, despite the fact that it relied upon sections 3 and 1(4) in addition to section 2. Perhaps the requirement of section 8 of the Administrative Procedure Act can be overlooked where the decision of the agency can be supported on alternative legal grounds not mentioned by the agency. But at the very least the reviewing court should be certain that the relevance of such alternative legal grounds has been thoroughly explored by the parties before it. As we have indicated, that cannot be said in this case.

2. In the portion of the Court's opinion dealing with the authority of motor carriers to utilize TOFC transportation in the performance of their authorized service, there is a fundamental factual error. Before identifying this error, we sketch the Court's analysis as we understand it so that the significance of the error will be clear.

In this part of its opinion, the Court dealt with the contention of appellees that, because of the Act's restriction of motor carrier operating authority, such carriers could not

simply hire railroads to transport by rail the freight tendered to the motor carriers by shippers. As we understand the opinion, the Court disposed of this issue in large part by reference to prior practices, some of them assertedly sanctioned by appellees, involving the employment by motor carriers of rail services to fulfill motor carrier transportation contracts (slip op.pp. 14 ff.).

Those prior practices, according to the Court, fell into three categories. One—the use by motor carriers of ferry services—was mentioned only briefly, and appears to have been given relatively little weight.[3] Another involved motor carrier participation in Plan I and Plan V TOFC arrangements with railroads. But, as the Commission's Report in this case makes clear (*e.g.* p. 343), those arrangements have been regarded by the Commission as valid only on the ground that the rail-motor TOFC service amounts to a through route arrangement under section 216(c), 49 U.S.C. 316(c), and this Court held in the case at bar that the service to be performed by motor carriers under the Commission's Rules would *not* involve through routes (slip op. p. 16, n.8).[4]

It is the third instance of past practice assertedly con-

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[3] It deserved none at all. Where a motor carrier uses a ferry to cross a river because there is no bridge, it would be wholly unreasonable to suggest that the motor carrier had departed from the scope of its operating authority. On the other hand, where water service is employed in a more substantial fashion in conjunction with motor carrier service, a through route must be established. *Peninsula Truck Lines, Inc.* v. *Puget Sound Nav. Co.*, 292 I.C.C. 157 (1954). Accordingly, to the extent there has been any past practice respecting motor carrier use of ferry service, it is inconsistent with the Court's conclusion. Again, it may be noted, this question respecting motor carrier use of ferry service was not briefed by the parties. Rather, it arose for the first time on oral agument.

[4] In connection with Plan I, which, as the Court noted (slip op. p. 15, n.7), is in litigation, the Court erred in stating that "None [of the appellees] urges the invalidity of Plan I as presently in use. . . ." (slip op. p. 15). As we pointed out in some detail in our brief to this Court (pp. 64-66), "these appellees, the Southern Railway System, have joined the

ceded as proper by appellees that, as we read the opinion, was of critical importance—the use by motor carriers, with railroad consent, of rail TOFC service on the basis of the rail "open tariffs"—a type of substitution of rail for motor service that unquestionably could not be justified as through route service. Thus, the Court stated: "[T]his 'concurrence' of the railroads, where granted, permits truckers to use TOFC service not only pursuant to Plans I and V, *supra*, but also under Plan III and Plan IV, the latter being open-tariff arrangements. The argument of [appellees] and the reasoning of the District Court carefully concede that the motor carriers may, without violating the Act or their charters, utilize this substituted service. . . . [A]ccording to the [appellees] and the District Court it [the statute] is not inconsistent with the use of open tariff TOFC if the railroad is willing" (slip op. p. 16).[5]

We would agree that our argument that motor carriers should be restricted to transportation by highway would be undermined if the established practice was—or perhaps even if appellees conceded that the practice could legitimately be—that motor carriers could hire railroads to transport by way of TOFC, under the railroads' Plan III or Plan IV "open tariff" arrangements available to shippers, the freight that had been tendered to motor carriers. But in point of fact the Court's assertion that appellees, and the District Court, conceded the legality of such a practice *has no foundation whatever*. We can find no pas-

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freight forwarders in attacking the validity of Plan I on the ground that it does not involve a genuine through route-joint rate arrangement." We cannot see how we could have made the point more explicitly. However, since the Court's error does not seem to us to have been material to the Court's decision, and since our—and the freight forwarders'—challenge to the legality of Plan I is incontestably a matter of record and, in our judgment, accordingly cannot be affected by this Court's misstatement, we do not press this mistake as a ground for rehearing.

[5] In the opinion "appellants" appears in this passage, rather than "appellees". This doubtless was a printer's error.

sage in any of appellees' briefs that suggests such a concession; and the District Court, in referring to consensual arrangements, plainly had in mind only arrangements that amounted to valid through route-joint rate plans. That was the way appellees argued the case to that court—namely, that valid through route arrangements were the only means for coordination of rail-motor service—and that was the way appellees argued the case to this Court.

To be sure, a concession on the part of appellees would hardly be necessary if in fact the railroads had established the practice of permitting motor carriers to utilize Plans III or IV with railroad consent. But, again, we can find nothing in the record to support the Court's view that this has in fact been the practice. In short, what seems to be an important element of the Court's opinion—that by concession and by practice motor carriers have been permitted to utilize TOFC in the performance of their authorized service under Plans II and IV—is insupportable.

3. While we have restricted this petition to an issue not briefed to, but decided by, this Court, and to the Court's erroneous view of past practice and its mistaken assertion respecting appellees' concessions, we suggest in addition—without venturing to reargue the point in any detail—that the Court's decision is of enormous importance and accordingly deserves reconsideration if there is any substantial doubt as to its correctness. There is no way to restrict the rule of "equality" fashioned by the Court's opinion. Thus, while the motor carriers, under that opinion, are free to tender freight to a railroad as if they were ordinary shippers, the railroads are likewise free to tender freight to a motor carrier—or to another railroad or a water carrier—as if they were ordinary shippers. Such an investiture of carriers with shippers' rights is alien to the transportation law of this country as it has developed since

1887. Perhaps the outcome will be in the public interest. Perhaps, as we believe, it will not. No one—including this Court by its own admission, and much more significantly the Commission by virtue of its total default in exploring these policy questions—can tell.

Conclusion

For the foregoing reasons, we request that rehearing of these cases be granted.

Respectfully submitted,

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Certificate of Counsel

I hereby certify, pursuant to Rule 58(2) of the Rules of this Court, that the foregoing Petition is presented in good faith and not for delay.

WILLIAM H. DEMPSEY, JR.